FILE COPY

Supreme Court, U. S.
FILED
FEB 22 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1160

CHARLES LUCAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BARRY IVAN SLOTNICK
15 Park Row
New York, N.Y. 10038
Attorney for Petitioner

Dick Bailey Printers — Tel.: (212) 447-5358

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	10
Certificate of Service	
Appendix A	A1

Cases Cited

Gibbons v. Ogden, 22 U.S. (Wheaton) 16 L.Ed. 23 (1823)	7
Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964)	8
Leary v. United States, 395 U.S. 6 (1969)	8
Polish National Alliance v. Labor Board, 322 U.S. 643, 650 (1944)	
Rewis v. United States, 401 U.S. 808 (1971)	5
Rochin v. California, 342 U.S. 165, 96 L.Ed. 183 (1952)	8
Screws v. United States, 325 U.S. 91, 89 L.Ed. 1495 (1945)	7
Turner v. United States, 369 U.S. 398	6

United States v. Vallejo, D.C.N.Y. 1970, 312 F.Supp. 244 aff'd 438 F.2d 663 6

United States v. Bass, 10 Cr.L. 3037, 30 L.Ed. 2d 488 (1971) 5
United States v. Hudson, 11 U.S. (7 Cranch) 32 .....

Constitutional and Statutory Provisions Cited

Constitution of United States, Article I, Sec. 8 3

Constitution of the United States, Amendment X 2

Rule 19(1)b, United States Supreme Court Rules 2

Title 21, United States Code §841(a)(1) 2

Title 21, United States Code §841(b)(1)(A) 2

Title 21, United States Code §846 .....

Title 21, United States Code §173-174 6

Title 21, United States Code §812 2

Title 28, United States Code §1254(1) 2

Title 21, United States Code §801 2

Other Authorities Cited

Hearings before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce – House of Representatives 8

Parts I and II Serial Numbers 91-45 and 91-46, H.R. 11701 and H.R. 13743 8

1970 U.S. Code Cong. and Adm. News 4566, 4569 9

BLEED THROUGH POOR COPY

IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1972

NO.

CHARLES LUCAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered in the above cause on January 23, 1973.

OPINION BELOW

The Court of Appeals for the Second Circuit affirmed the Judgment of the District Court for the Southern District of New York (Cooper, J.) without opinion – from the bench at the time of argument. The aforesaid affirmance has not as yet

been reported. Judgment was filed on January 23, 1973, and is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was filed on January 23, 1973 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. section 1254 (1) and Rule 19(1)b, United States Supreme Court Rules.

QUESTIONS PRESENTED

1. Whether the attempted regulation of Cocaine Hydrochloride through the Drug Abuse Prevention and Control Act (21 U.S.C. 801 et seq.) is an improper attempt by Congress under the Commerce Clause of Article I, Section 8 of the Constitution of the United States to control Cocaine Hydrochloride?

2. Whether Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) are unconstitutional in their application to Cocaine Hydrochloride and violate the Tenth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. Constitution of the United States, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

II. Constitution of the United States, Article I, Section 8:

"The Congress shall have power . . . to regulate commerce with foreign nations and among the several States . . ."

III. United States Code, Title 21:

"Section 841(a)(1) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . ."

STATEMENT

On March 2, 1972 Petitioner was charged in a one count indictment with distributing and possessing with intent to distribute cocaine hydrochloride, alleged as a schedule II narcotic drug controlled substance in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). The Petitioner entered a plea of Not Guilty. Thereafter, Petitioner filed a Motion to Dismiss, which attacked the Constitutionality of the abovementioned statutes – AS THEY APPLIED TO COCAINE HYDROCHLORIDE. The Motion to Dismiss was denied by the Trial Court. Thereafter, Petitioner waived a jury and reargued his original Motion for Dismissal due to the unconstitutionality of the Drug Abuse Prevention and Control Act – as it applied to Cocaine Hydrochloride.

Subsequent to the denial of his Motion to Dismiss Petitioner again moved the Court for dismissal on similar Constitutional grounds. This was denied after the decision was reserved by the Trial Judge. Petitioner was found guilty as

charged in the one count Indictment. The Government offered its case through the use of the testimony of Special Agents of the Bureau of Narcotics and Dangerous Drugs.

The defendant's case was made up of a stipulation by the parties that cocaine hydrochloride is legally manufactured in the United States by several drug firms and if the executives of the various drug firms were to be called they would testify to that fact.

Part of the stipulation encompassed the fact that cocaine hydrochloride has been made by and is presently being made by several domestic drug firms, including a local firm – Malinckrodt Chemical Company. The defense also alleged that cocaine had been made and is presently being manufactured in a legal form by Eli Lily and Company and also by Merck and Company.

The defendant's chief contention was that the statutes upon which he was being charged were unconstitutional – and, in the alternative, so overly broad so as to invest in the District Court improper jurisdiction.

On August 24, 1972, Petitioner was sentenced to one and one-half years imprisonment.

REASONS FOR GRANTING THE WRIT

1

It is strongly urged that the indictment herein is based upon unconstitutionality due to the fact that it oversteps the bounds of Federal jurisdiction, and is so vague and ambiguous

so as to violate due process (*United States of America v. Bass*, 10 Cr.L. 3037, 30 L.Ed.2d 488 (1971)).

It is the defendant's contention that this statute is as violative of the United States Constitution as 18 U.S.C. Section 1202, pursuant to the reasoning of Mr. Justice Marshall in *United States v. Bass, supra* (12/20/71).

In the words of the Court:

> "We conclude that Section 1202 is ambiguous in the critical respect. Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." (Page 3037). See also *Rewis v. United States*, 401 U.S. 808 (1971).

It is the defendant's contention that without a proper nexus to interstate commerce, this statute is unconstitutional. In the aforementioned *Bass* case, the dissenting opinion of Mr. Justice Blackman, with whom the Chief Justice joins, indicates what is *not* the law of the land – that specific findings of Congress are sufficient to prohibit certain activity.

Specifically, the only basis for Federal jurisdiction in the matter before the Court is the fact that there are certain specific findings of Congress which attempt to invest Federal Jurisdiction with regard to "possess(ion) with intent to distribute, a schedule to narcotic drug . . ." (Indictment No. 72 Cr. 249, *U.S.A. v. Lucas*) – to wit, cocaine.

Sections 812, 841(a)(1) and 841(b)(1)(A) are alleged as

being violated in the aforementioned indictment. It is the defendant's contention that the specific findings of Congress with regard to this indictment would clearly be the same as if Sections 173 and 174 had not been repealed (21 U.S.C. 173, 174). Those sections were finally looked at with great skepticism by several Circuits and finally this Court – as to cocaine. See *United States v. Vallejo*, D.C.N.Y. 1970, 312 F.Supp. 244 aff'd. 438 F.2d 663; see also *Turner v. United States*, 396 U.S. 398.

The new drug abuse statute was promulgated in order to avoid the presumption of 21 U.S.C. 173 and 174, solely due to the fact that those presumptions were severely criticized and finally (with regard to cocaine) laid aside. *Turner v. United States*, 396 U.S. 398.

It is contended that even the most conservative view of *Turner, Id.* would indicate that in this matter, the presumption would be invalid as to the quantity of cocaine possessed herein. However, Congress cannot get around the "presumptions" by legislating as to narcotic control via the use of "specific findings".

This Court has held unconstitutional (as applied to cocaine), the statutory presumption that guilt may be presumed upon unexplained knowing possession of drugs not in original stamped package. The court has laid to rest the presumption with regard to cocaine hydrochloride as to Federal jurisdiction. The difference between cocaine hydrochloride and a drug such as heroin is that cocaine hydrochloride is *legally* manufactured and distributed in the United States and in this jurisdiction – and has been for many years.

Therefore, due to the legal manufacture of cocaine hydrochloride in the United States (and distribution to drug stores, hospitals, etc.), there can be no proper Federal jurisdiction pursuant to 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A).

The aforementioned statutes base their "so-called Federal jurisdiction" pursuant to 21 U.S.C. 801 in which Congress has made "special findings". While it is conceded that heroin may very well fall properly within this statutory scheme – cocaine cannot. The mere fact that cocaine hydrochloride is manufactured legally in the United States is sufficient to remove it from the statutory scheme of the new "Drug Abuse Prevention and Control" Act – if it is presumed that Congress did intend cocaine hydrochloride to be encompassed within the statutory scheme.

2.

The statutes (referred to above) are an attempt by Congress to enact Criminal legislation in the field of Drug Control. However, Congress does not have the power to invade "... legislation which embraces everything within the territory of a State not surrendered to the general government ..." *Gibbons v. Ogden*, 22 U.S., 16 L.Ed. 23 (1824).

This Court in *Screws v. United States*, 325 U.S. 91, 89 L.Ed. 1495 (1945) stated:

> "Our national government is one of delegated powers alone. Under our Federal System the administration of criminal justice rests within the States except as Congress, acting within the scope of its delegated powers, has created offenses against the United States. *Jerome v. United States*, 318 U.S. 101, 105, 87 L.Ed. 640, 643, 63 S. Ct.

> 483. As stated in *United States vs. Criukshank*, 92 U.S. 542, 553, 554, 23 L. Ed. 588, 592, 'It is no more the duty or within the power of the United States to punish for conspiracy to falsely imprison murder within a State, than it would be to punish for false imprisonment or murder itself.' Id. at 109.

This Court has decreed that in order to allow Congress to Legislate over activities and make them penal in nature there must be a nexus to what is allowed to the Federal System.*

> "In our Federal System the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means to carrying into execution its limited grant to legislative powers. U.S.C. Art. 1, Sec. 8. *Rochin v. California*, 342 U.S. 165, 96 L.Ed. 183 (1952).

See also: This Court's reasoning in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

We pursue our request of this Court to declare the Statutes in question unconstitutional and in so doing remind the Congress of this Court's admonition in *Leary v. United States*, that "Congress, no less than we, is subject to constitutional requirements . . .", 395 U.S. at 53.

This Court should not sustain the Federal invasion into an area of law enforcement reserved to the States, simply because Congress proclaimed, in Sec. 801 of Title 21, that it had made

---

*Hearings Before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce – House of Representatives. Parts I and II Serial Numbers 91-45 and 91-46. H.R. 11701 and H.R. 13743, as held during the second session on the 91st Congress, completely avoided the issues of the proper nexus granting Federal jurisdiction in penal control of Cocaine Hydrochloride.

"Findings" relating the subject matter of the Act to interstate or foreign commerce, 21 U.S.C. § 801 (1)(7); see also Legislative History, 1970 U.S. Code Cong. & Adm. News, 4566, 4569.

The decisions in *Leary, supra* and *Turner, supra,* are indicative of the fact that the Congressional Findings are invalid as to Cocaine Hydrochloride (and Marijuana).* This Court specifically exempted Cocaine and Marijuana from Drugs that are presumptively involved in the Federal Scheme of our Constitution. It is to be noted that the States have legislated against the Use, Possession and Distribution of Cocaine in as thorough a manner as the Congress. Penalties for violations of these Statutes are as harsh if not harsher than the Federal maximum presented here. (Presently, New York is considering a mandatory life imprisonment for one who distributes certain drugs. Whether Cocaine will be among them is yet to be seen.) State legislatures and law enforcement officials are adequately equipped to contend with the menace of Drug Abuse re Cocaine or Marijuana.

This Court has not had an opportunity to review the Constitutionality of the Drug Abuse Prevention and Control Act with regard to Cocaine Hydrochloride. We are, *in the first instance,* presented with a major question of Constitutional Law as to the abovementioned Statutes. It is respectfully submitted that the Statutes in question are (A) Unconstitutional, and (B) Not the proper subject for Federal jurisdiction.

Due to the "intertwining" of Constitutional concepts, we ask that both arguments be read as one.

---

*Marijuana is not argued here, as Petitioner's conviction involved Cocaine. However, the same arguments could be pursued with regard to Marijuana.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BARRY IVAN SLOTNICK
15 Park Row
New York, N.Y. 10038
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of January one thousand nine hundred and seventy-three.

Present: Hon. Leonard P. Moore; Hon. Paul R. Hays, Hon. James L. Oakes, Circuit Judges,

---

72-2037
72-2096

United States of America,
Plaintiff-Appellee,

v.

Charles Lucase and Jerome Jiminez,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1160

CHARLES LUCAS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-6232

JEROME JIMINIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a bench trial in the United States District Court for the Southern District of New York, petitioners were convicted of having possessed cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner Jiminez was sentenced to imprisonment for five years; petitioner Lucas was sentenced to imprisonment for eighteen months. The court of appeals affirmed *per curiam*.

Petitioners' only contention here is that 21 U.S.C. 841 (a)(1) is unconstitutional because it does not require proof of a nexus with interstate commerce. This question is akin to the one advanced unsuccessfully in *Perez* v. *United States*, 402 U.S. 146, where this Court reaffirmed prior rulings that the Commerce Clause can reach wholly intrastate activities where, as a class, such activities have a substantial effect upon interstate commerce. This is so whether or not an individual situation can be shown to bear such a connection. There can be little doubt that the statutory scheme which includes 21 U.S.C. 841 deals with matters having a profound effect on interstate commerce. This determination by Congress, reached after extensive examination into the vice of narcotics trafficking, has been codified in the form of explicit legislative findings. See 21 U.S.C. 801. In light of the rational basis for the particularized congressional findings, 21 U.S.C. 841 is clearly valid. The courts of appeals have uniformly reached this conclusion and this Court has denied further review of the issue. See, *e.g.*, *United States* v. *Lopez*, 459 F. 2d 949 (C.A. 5), certiorari denied *sub nom. Llerena* v. *United States*, 409 U.S. 878; *United States* v. *Rodriquez-Camacho*, 468 F. 2d 1220 (C.A. 9), certiorari denied March 19, 1973, No. 72-5946.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.